IN THE HIGH COURT OF JUDIATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8051 OF 2004

Lilawati S.Magar & Anr. .. Petitioners.
Vs.
Balasaheb V.Patil & Anr. .. Respondents.

Smt.V.B.Thadani for the petitioners.
Mr.Surel S.Shah for respondent no.1.

CORAM : D.B.BHOSALE, J.

DATED : 12TH OCTOBER, 2004

P.C.:

. Heard Mrs.Thadani, learned counsel for the petitioners and Mr.Shah, learned counsel for respondent no.1.

2. Rule, returnable forthwith.

3. Mr.Shah, learned counsel waives service for respondent no.1. By consent of the parties taken up for final hearing.

4. This writ petition under Article 227 of the Constitution is directed against the order dated 20.8.2004 passed by the Adhoc Additional District Judge, Solapur below Exhibit-1 in Civil

Miscellaneous Application No.202/2004 by which the petitioners' prayer for restoration of Civil Miscellaneous Appeal No.99/2001, which came to be dismissed on 16.12.2002, has been rejected. While dismissing the appeal, which was sought to be restored, the following order was passed by the learned Judge on 16.12.2002.

> "Perused purshis Exhibit-24. Heard Advocate Miss Bakale on behalf of the appellant. She submits that the appellant has filed Writ Petition before the Hon'ble High Court, therefore, she is not interested to proceed with the present appeal. In view of this I pass the following order.
>
> 1. The appeal filed by the appellant/original defendant no.1 and 2 is hereby dismissed.
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> 2. R & P be sent to trial court forthwith.
>
> 3. The parties are directed to appear before trial court on 31.12.2002".

5. It appears that pursis Exhibit-24 was filed by an advocate for the petitioners on record making

reference to a writ petition pending before this court at the relevant time. In fact no such writ petition was pending. According to Mrs.Thadani, learned counsel for the petitioners, the petitioners' advocate on record filed the said pursis Exhibit-24 behind the petitioners' back and without her consent and knowledge pursuant to which the order dated 16.12.2002 came to be passed by the Adhoc Additional District Judge, Solapur dismissing the Miscellaneous Appeal No.99/2001. Mrs.Thadani further submitted that the petitioners had never instructed her advocate to file such pursis. According to Mrs.Thadani, the petitioner has filed a complaint against the advocate with the Bar Council. She further submitted that in fact the petitioner was religiously following the different proceedings against the respondents at different level including this court and she absolutely had no reason to withdraw the appeal and that too on the ground that the writ petition was pending in this court, which was factually incorrect. Mr.Shah, learned counsel for respondent no.1, on the other hand submitted that it is not open for the petitioners to now contend that she had not instructed her advocate to withdraw the appeal. In support of his contention he placed reliance on the

judgment of the Apex court in **Byram Pestonji Gariwala Vs. Union Bank of India AIR 1991 S.C. 2234.**

6. The appeal filed by the petitioners was directed against the order dated 3.5.2001 passed below Exhibit-5 application by which the petitioner was restrained from obstructing or dispossessing the respondent-plaintiff from carrying out country liquor business. It appears that the dispute between the petitioners-defendants and the respondent-plaintiff in respect of liquor business has been going on since the death of her husband and it is also pending in this court. Initially the license was issued in favour of the petitioner's husband being "ex-service men". After the death of original licence holder petitioner no.1, his widow, wanted her name to be entered in the license. According to the petitioner, the partnership between her husband and respondent no.1 stood dissolved after her husband's death and, therefore, he has no right whatsoever in the said business. I do not wish to enter into that controversy in the instant petition inasmuch as the only question involved is whether Miscellaneous Appeal No.99/2001 is liable to be restored to file

and heard on merits.

7. The petitioner had filed Writ Petition No.5192 of 2001 in this court and it was disposed of by order dated 8.2.2002 by the Division Bench thereby remanding the matter to the Secretary, State Excise to hold an enquiry into the allegation made by the petitioners regarding the illegal insertion of the name of the respondent-plaintiff in the licence. Thereafter the Secretary, State Excise, decided the revision after remand on 26.8.2002 against which the petitioners-defendants as well as the respondent-plaintiff, both filed writ petition in this court bearing Writ Petition Nos.3621 of 2002 and 3981 of 2003 respectively. The petitioner filed writ petition on 2nd June, 2003. Both the writ petitions are pending for hearing and final disposal in this court. It is thus clear that since 8.2.2002 till 2.6.2003 no writ petition was pending in this court. It further shows that a reference made to the writ petition in the pursis Exhibit-24 was factually incorrect. Therefore, it supports the petitioner's claim that she never instructed her advocate to file Exhibit-24 application. I do not wish to comment as to whether the concerned advocate made

reference to the so called writ petition in the pursis Exhibit-24 in collusion with the respondent-plaintiff or it was genuinely filed on instructions from the petitioners or due to misunderstanding. Considering the overall facts and circumstances of the case, in my opinion, the interest of justice would be met, if the petitioner is given benefit of the circumstances, in which the order dated 16.12.2002 came to be passed. In view of the peculiar facts and circumstances of the case, the contentions urged by Mr.Shah, learned counsel for respondent no.1 and the judgment relied upon by him in **Byram Pestonji Gariwala's** case (supra) would be of no avail to the respondent-plaintiff. The Additional District Judge is, accordingly, directed to restore Miscellaneous Civil Appeal No.99/2001 on file and dispose it of as expeditiously as possible and within a period of four months from the date of receipt of this order. In the result the petition is allowed. Rule is made absolute in aforesaid terms. No orders as to costs.

(D.B.Bhosale, J.)